UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MOJO NICHOLS, et al.,

Plaintiffs,

-against-

NOOM INC., et al.,

Defendants.

DISCOVERY ORDER CONCERNING MODIFICATION OF PROTECTIVE ORDER

20-CV-3677 (LGS) (KHP)

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KATHARINE H. PARKER, United States Magistrate Judge

Plaintiffs represent a putative class of consumers who subscribed to Noom Inc.'s ("Noom") app-based weight loss program. According to the complaint, Noom engaged in deceptive practices to entice consumers to sign up for a trial period and then trap them into an auto-renewed subscription that was difficult to cancel, saddling them with unwanted multi-month subscription fees.

Defendants have moved to dismiss the Third Amended Complaint in this action on various grounds including, but not limited to, failure to plead fraud with particularity, failure to state a claim, and waiver. (ECF No. 205.) Defendants also argue that Plaintiffs lack standing to seek injunctive relief in this action. (*Id.*)

Pending resolution of that motion, the parties have engaged in discovery. To protect confidential information exchanged in discovery, the parties entered into a Stipulated Order of Protection. (ECF No. 58.) This Court encouraged the parties to adopt the Court's model protective order to reduce time and expense negotiating one, which the parties did in large part. (Sept. 9, 2020, Hr'g Tr. at 31:1–18.) Noom has produced confidential information

pursuant to that agreement, including some which was later presented to the Court in connection with discovery disputes. To continue to protect that information, Noom requested, and the Court granted, permission to file that information under seal.

Plaintiffs have now moved to amend the Protective Order so that they can utilize materials obtained through discovery in this action in two state court actions they anticipate filing against Defendant Noom. (ECF No. 209.) Believing that they likely will lose the motion to dismiss with respect to their claims for injunctive relief, Plaintiffs explain that they intend to bring the two state court actions, one in California and one in New York, to obtain injunctive relief they are unlikely to get in this Court. (*See* ECF No. 220 at 2.)

Defendants oppose any changes to the Protective Order. They argue that Plaintiffs' request is premature because they have not yet filed the state court actions, that the strategy of pursuing claims in multiple courts is inefficient and illogical, and that Plaintiffs do not satisfy the standard for modifying a protective order.

As a general rule, where a party has reasonably relied on a protective order, the protective order should be modified only upon a showing of "'improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.'" *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 (2d Cir. 2001) (quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)). Courts consider the following factors to determine whether a party reasonably relied on a protective order: "(1) the scope of the protective order; (2) the language of the order itself; (3) the level of inquiry the court undertook before granting the order; and (4) the nature of reliance on the order." *Tradewinds Airlines, Inc. v. Soros*, No. 08-cv-5901 (JFK), 2016 WL 3951181, at *2 (S.D.N.Y. July 20, 2016) (citing *In re Sept. 11 Litig.*, 262 F.R.D. 274, 277

(S.D.N.Y. 2009)). The Court also may consider additional factors such as the purpose of the modification, whether additional non-parties would gain access to the information, and the type of confidential information at issue. *In re EPDM*, 255 F.R.D. 308, 318 (D. Conn. 2009).

In this case, the Protective Order was entered for purposes of discovery and limits the use of confidential information produced in discovery to this action alone—a typical provision. The Court did not engage in a high level of inquiry regarding the subjects of protection—instead the parties utilized a model provided by the Court. Thus, the Protective Order is more akin to a "blanket" order designed to facilitate discovery—it was not designed to protect specific documents or deponents; rather, it requires the parties to review their production and then permits them to designate as confidential only those documents that the producing party believes are "proprietary, a trade secret or otherwise sensitive non-public information." (ECF No. 58 ¶ 1.) The Protective Order also permits the receiving party to challenge a confidentiality designation and states that neither party should assume that a document designated confidential for discovery purposes will be permitted to be filed with the Court under seal. (*Id.* ¶ 9.) Thus, neither party can rely on the Protective Order to ensure the confidentiality of documents exchanged in discovery that are later used in connection with dispositive motions and/or trial. Rather, a separate motion to seal must be filed in connection with such documents.

Noom has reasonably relied on the Protective Order and endeavored to adopt narrowly tailored confidentiality designations to protect its sensitive business information from public disclosure and has, in fact, obtained further protection from public disclosure for some of this information when the Court granted requests to seal. (*See, e.g.*, ECF Nos. 118, 166, 168, 181,

187, & 203 (requests to seal confidential materials in public filings).) Its course of conduct reflects an understanding that the Court will scrutinize publicly filed documents pursuant to a motion to seal, that it can only protect such documents from disclosure if the Court grants such a motion, and that the Protective Order only prevents Plaintiffs and other specified associated persons from disclosing confidential information outside the conduct of this litigation. To be sure, this is still substantial protection and eliminates many unnecessary discovery disputes over confidentiality.

On balance, the Court agrees that if Plaintiffs elect to file actions for injunctive relief against Noom in state court, it would be more efficient to permit the parties to use discovery obtained in this case in those state court action subject to the terms of this Court's Protective Order. *Charter Oak Fire Ins. Co. v. Electrolux Home Prods., Inc.*, 287 F.R.D. 130, 134–35 (E.D.N.Y. 2012) (modifying protective order so that confidential material could be disclosed to other attorneys representing a named party in "any other pending or future action between the parties" stemming from similar facts or circumstances as those in the initial case); *see also Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, 192 F. Supp. 3d 400, 406 (S.D.N.Y. 2016) ("where, as here, two lawsuits have been filed by the same plaintiff . . . on the same legal theories, against two defendants who already share the same counsel, it is difficult to imagine what non-tactical objection [the plaintiff] could have to the prospect of those defendants sharing discovery as well"). But those actions have not yet been filed. Thus, there is no need for a modification of the Protective Order at this point in time. Additionally, it is unclear to this Court what the scope of discovery will be in those actions and whether the scope of information relevant in those cases will be co-extensive to the discovery in this action. After

Plaintiffs file those actions, the type of information that needs to be exchanged in those cases will be clearer and the parties and this Court will be in a better position to evaluate the nature of the modification to the Protective Order that may be required. While it seems an order similar to the one proposed by Plaintiffs could be appropriate, it is premature to determine the precise scope of such a modification at this time.

CONCLUSION

For the reasons set forth above, Plaintiffs' letter motion at ECF No. 209 is DENIED WITHOUT PREJUDICE.

SO ORDERED.

DATED: March 12, 2021
New York, New York

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge